

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

IN RE MICROSOFT CORP.
ANTITRUST LITIGATION

This Document Relates to:
Novell, Inc. v. Microsoft Corporation,
Civil Action No. JFM-05-1087

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) MDL Docket No. 1332
) Hon. J. Frederick Motz
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NOVELL'S RESPONSE TO MICROSOFT'S LOCAL RULE 104.7 CERTIFICATE

Microsoft's Rule 104.7 Certificate attempts to mislead this Court and fails to meet issue with the facts. In a transparent attempt to deflect attention away from Novell's pending Motion for Summary Judgment, Microsoft states that "Novell itself has not produced any documents from its own files in response to the six disputed document requests," and suggests that Novell has purposefully failed "to preserve evidence relevant to the claims it planned for many years to assert against Microsoft."¹ The statement that Novell has not produced any documents from its own files is false, and the suggestion that Novell has failed to preserve relevant evidence is disingenuous at best.

As to the statement, Novell produced all documents responsive to Microsoft's requests 6 through 9 many years ago in response to virtually identical requests contained in a subpoena issued by Microsoft to Novell in the *Caldera v. Microsoft* litigation. Novell also produced all documents responsive to Microsoft's requests 4 and 5 by turning over its counsels' files in the *Novell, Inc. v. Canopy Group, Inc.* action. In the last meet and confer communication between the parties, Novell asked Microsoft to advance any "cogent reason[]" that would justify further efforts" to produce additional documents.² Microsoft never responded.

¹ Microsoft's Local Rule 104.7 Certificate ("Certificate") at 6.

² June 16, 2008 Letter from Jeffrey M. Johnson to Steven L. Holley (attached as Exhibit 3 to Microsoft's Certificate) ("June 16, 2008 Letter").

As to the suggestion, the documents requested by Microsoft are completely irrelevant to the claims advanced as Caldera's prosecution of claims for injuries suffered by DR-DOS has nothing to do with the present action, which involves injuries to WordPerfect and other office productivity applications. Moreover, it is preposterous to assert that documents that were produced to Microsoft have not been preserved. Rather, the documents received by Microsoft allegedly go to the tangential issue of whether Novell somehow sold its office productivity application claims to Caldera, an argument this Court has previously characterized as "a far stretch," or is otherwise precluded from pursuing its claims by res judicata principles.

Microsoft's Motion to Compel only serves as an exemplar of the Supreme Court's warning in *Taylor v. Sturgell*, 128 S. Ct. 2161, 2176 (2008), that amorphous claim preclusion arguments like those advanced by Microsoft here have the potential to "spark wide-ranging, time-consuming, and expensive discovery."³ In any event, however, Microsoft's Motion to Compel should be denied as Novell has fully responded to the requests in issue.

I. THE DOCUMENTS RELATED TO THE CALDERA LITIGATION [REQUESTS 6-9] WERE PRODUCED TO MICROSOFT YEARS AGO IN RESPONSE TO MICROSOFT'S SUBPOENA TO NOVELL IN CALDERA

On July 15, 2008, Novell filed a Motion for Summary Judgment on Six Affirmative Defenses in accordance with the Court's suggestion to timely raise threshold issues to narrow the disputes and curtail unnecessary discovery. The motion seeks to put an end to Microsoft's "far stretch" assertion that Novell intentionally sold its right to bring its claims here when it sold Novell's PC operating system, DR-DOS, to Caldera, Inc. or that Novell is otherwise precluded from bringing its claims because Novell and Caldera were in "privity or had a relationship . . .

³ The Supreme Court's concern is evident here as Microsoft has subpoenaed four third-party companies, also requiring them to produce documents concerning the *Caldera, Inc. v. Microsoft Corp.* and *Novell, Inc. v. Canopy Group, Inc.* actions.

that was akin to privity.”⁴ Microsoft requested and Novell had no objection to a three-week extension until August 22, 2008, for Microsoft to file its opposition to Novell’s summary judgment motion.

Microsoft followed the extension request by filing its out-dated Motion to Compel, leaving little doubt that Microsoft will now claim that it needs more discovery in order to respond to Novell’s summary judgment motion. This ploy must fail, as Novell has already produced all documents in its possession, custody and control that are responsive to the requests in issue. As Novell’s counsel explained to Microsoft’s counsel in the parties’ meet and confer exchanges, all documents responsive to requests 6 through 9 were produced in response to Microsoft’s subpoena to Novell years ago in the *Caldera* action.

In 1996, Caldera purchased DR-DOS and Novell’s antitrust claim against Microsoft for harm that Microsoft caused to the DR-DOS business (the “DR-DOS Claim”). The sale was memorialized in two documents: the License Agreement, which set forth the royalty provisions, and the Asset Purchase Agreement, which defined and limited the assets that Novell intended to transfer – specifically, “DOS Products” and “Related Technology.” On July 23, 1996, Caldera brought suit against Microsoft for the “immediate[] and irreparabl[e] injur[y]” caused to “the DR DOS Business” from Microsoft’s monopolization of “the DOS Market.”⁵

Microsoft subpoenaed Novell, requesting production of all documents concerning the Asset Purchase Agreement and any ancillary agreements, including any agreement or communications between Caldera and Novell regarding the lawsuit, DR-DOS, Microsoft, or any

⁴ Microsoft’s Resps. and Objs. to Novell’s First Set of Interrogs. and Doc. Reqs. Nos. 3, 4, 8-10 (June 16, 2008).

⁵ See Compl., *Caldera* (D. Utah July 23, 1996) ¶¶ 62, 64 (attached as Exhibit 10 to Novell’s Mem. of Law in Support of Novell’s Mot. for Summary Judgment on Six Affirmative Defenses (July 15, 2008) (“Novell’s Summ. J. Mot.”)).

Microsoft product.⁶ Novell produced more than 600 boxes to Microsoft in response to that subpoena, which requested the same information Microsoft seeks in requests 6 through 9 here.⁷ As part of its compliance with the subpoena, Novell also sent out a company-wide e-mail, with a copy of Microsoft's subpoena attached, requesting that each Novell employee search for and produce any documents responsive to Microsoft's subpoena. By the end of the *Caldera* litigation, Novell had produced, either directly or indirectly through Caldera, more than 1,500 boxes of documents to Microsoft.

Microsoft also requested that Caldera produce all materials prepared by Novell's counsel related to the DR-DOS Claim. Novell moved to intervene to protect its work product privilege, but the court denied that motion, finding that non-party Novell had "only the most tangential, residual, economic interest in the outcome of the litigation. It is not direct or litigation related," and Novell was not "in the position of making the strategic and tactical decisions."⁸

In addition to initially producing all responsive documents to Microsoft in the *Caldera* action, including the work product of its counsel, Novell also produced documents to Microsoft and plaintiffs in response to subpoenas served in *In re Microsoft Corp. Antitrust Litigation*, MDL 1332 (D. Md.), and *Microsoft Cases*, J.C.C.P. No. 4106 (Cal. Super. Ct.). Both plaintiffs' subpoenas and Microsoft's subpoenas demanded that Novell produce the same documents Novell had previously produced in the *Caldera* action. Because these documents were already in Microsoft's possession, Novell objected to these requests. In response,

⁶ See July 10, 1997 Subpoena, Reqs. 1-3 (attached as Exhibit A to Exhibit 3 of Microsoft's Certificate).

⁷ See Microsoft's First Set of Reqs. for Prod., Reqs. 6-9 (attached as Exhibit B to Exhibit 3 of Microsoft's Certificate).

⁸ Order, *Caldera* (D. Utah July 28, 1998) at 2 (attached as Exhibit 17 to Novell's Summ. J. Mot.); Hearing Tr., *Caldera* (D. Utah July 16, 1998) 11:25-12:7 (attached as Exhibit 14 to Novell's Summ. J. Mot.).

Microsoft acquiesced, agreeing to treat the documents produced by Novell in the *Caldera* case as though produced in the MDL and California actions.⁹

As shown above, the documents sought by Microsoft in requests 6 through 9 were produced by Novell to Microsoft years ago in response to virtually identical requests. The same documents were demanded twice again in subsequent Microsoft-related litigations, including this MDL proceeding. Following Novell's timely objection, Microsoft agreed to treat the *Caldera* production as produced in this MDL proceeding. Microsoft's present demand, years later, that Novell produce the same documents yet again in this MDL proceeding is outrageous on its face and should be rejected.¹⁰

II. THE DOCUMENTS RELATED TO THE *CANOPY GROUP* LITIGATION [REQUESTS 4-5] WERE PRODUCED TO MICROSOFT IN THIS ACTION

After *Caldera* and Microsoft settled their lawsuit, Novell brought suit for breach of contract against the Canopy Group, Inc. ("Canopy"), the successor-in-interest to *Caldera*. Novell alleged that Canopy deducted attorneys' fees, court costs, and other litigation expenses before paying Novell its percentage of the recovery from the *Caldera* settlement, but that the Asset Purchase and License Agreements made no allowances for those deductions.¹¹ The district court agreed, granting summary judgment in favor of Novell, and the Utah Court of Appeals affirmed.¹²

Novell objected to Microsoft's requests 4 and 5 for documents relating to the *Canopy Group* case on relevancy and other grounds. Nevertheless, as Microsoft concedes, Novell

⁹ See February 23, 2001 Letter from Joseph E. Neuhaus to John P. Mullen (attached as Exhibit D to Exhibit 3 of Microsoft's Certificate).

¹⁰ Nor has Microsoft ever supplied any electronic copies of, or identifying information concerning, the hundreds of thousands of documents that Microsoft received from Novell in the *Caldera* action, despite Novell's counsel's repeated requests for that information to help facilitate the parties' resolution of this dispute.

¹¹ See *Novell, Inc. v. Canopy Group, Inc.*, 92 P.3d 768, 771 (Utah Ct. App. 2004).

¹² See *id.* at 771-75.

produced documents responsive to request 4, having requested and obtained them from the files of Anderson & Karrenberg, P.C., who served as counsel to Novell in that case.¹³ Novell's production contained documents produced by Novell, Canopy, and third parties Arthur Anderson and Microsoft, in addition to court pleadings, correspondence, deposition transcripts, deposition exhibits, and documents used to support dispositive motions in the *Canopy Group* case.

In its Certificate, Microsoft states that Novell did not produce any documents from its own files in response to requests 4 and 5 – an argument that Microsoft's counsel never raised in its Motion to Compel back in February or in subsequent conversations with Novell's counsel. Microsoft ignores, however, Novell's prior representation that, "to our knowledge, our April 7, 2008 production contains all of the responsive documents Novell has from the *Canopy* case."¹⁴

Microsoft nonetheless asserts that Novell's production is incomplete because "Microsoft does not believe it has received *all* documents produced by the parties and any third parties during the *Canopy Group* case."¹⁵ Microsoft's counsel made the same unsupported assertion in its letter of June 10, 2008.¹⁶ As Novell's counsel responded, "you [Microsoft's counsel] fail to identify what documents you believe are missing or the basis of any belief that documents are missing. Such information is necessary for Novell to address any concerns,

¹³ Request 5 is hopelessly vague, demanding documents "concerning" a statement made by the Utah Court of Appeals in affirming Novell's award of summary judgment. If there are any such documents, they would have to be part of the record in the *Canopy Group* action and therefore contained in the documents produced to Microsoft from the Anderson & Karrenberg files.

¹⁴ See June 16, 2008 Letter. Novell recognizes its continuing obligation under the discovery rules to supplement its production should it identify going forward any responsive documents to these requests.

¹⁵ Certificate at 5-6 (emphasis added).

¹⁶ June 10, 2008 Letter from Steven L. Holley to Jeffrey M. Johnson (attached as Exhibit 2 to Microsoft's Certificate).

